Mailed 3/1/2000

IN THE MATTER OF:		
Dorothy Burgess (Widow of John C. Burgess, Jr.) Claimant		Case No: 1999-LHC-2347
against		OWCP NO: 1-146576
Bath Iron Works Corporation Employer/Self-Insurer		
and		
Commercial Union Companies Liberty Mutual Insurance Co. Birmingham Fire Insurance Co. Carriers		
and		
Director, Office of Workers' Compensation Programs U.S. Department of Labor Party-in-Interest		

APPEARANCES:

G. William Higbee, Esq.
For the Claimant

Stephen Hessert, Esq.
For the Employer/Self-Insurer

Richard F. van Antwerp, Esq.
For Commercial Union Companies

Kevin M. Gillis, Esq.
For Liberty Mutual Insurance Co.

Nelson J. Larkins, Esq.
For Birmingham Fire Insurance Co.

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 15, 1999 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer/Carrier. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
RX 1	Attorney van Antwerp’s letter	12/27/99
RX 2	November 30, 1999 Deposition Testimony of Dr. Timothy Howe	12/27/99
CX 18	Attorney Higbee’s letter filing his fee petition	01/26/00
RX 3	Attorney van Antwerp’s comments thereon	02/04/00
CX 19	Attorney Higbee’s response thereto	02/11/00

The record was closed on February 11, 2000, as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Decedent and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that her husband suffered an injury on December 1, 1998 in the course and scope of his employment.

4. Claimant gave the Employer notice of her husband’s alleged injury in a timely fashion.

5. Claimant filed timely claims for compensation and the Employer filed timely notices of controversion.

6. The parties attended an informal conference on June 16, 1999.

7. The applicable average weekly wage is $435.88, the National Average Weekly Wage as of the dates of injury.

8. The Employer and its Carriers have paid no benefits herein.

9. Commercial Union Companies provided coverage under the Longshore Act from January 1, 1963 through February 28, 1981. Liberty Mutual Insurance Company provided such coverage from March 1, 1981 through August 31, 1986 and Birmingham Fire Insurance Company provided such coverage from September 1, 1986 through August 31, 1988, at which time the Employer became a self-insurer under the Act and such status continued until the time of the hearing on December 15, 1999. (TR 5-6)

The unresolved issues in this proceeding are:

1. Whether Decedent's pulmonary condition is causally related to his maritime employment.

2. If so, the date of injury and the nature and extent of his disability.

3. The date of maximum medical improvement.

4. Entitlement to interest on unpaid compensation benefits, as well as payment of certain medical expenses.

5. The applicability of Section 8(f) of the Act.

Summary of the Evidence

John C. Burgess, Jr. ("Decedent" herein), who was born on February 25, 1933 and who had a high school education and whose employment history consisted primarily of manual labor, began working on October 26, 1951 as a probational worker at the Bath, Maine shipyard of the Bath Iron Works Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Kennebec River where the Employer builds, repairs and overhauls vessels. He was initially assigned to Department 25 (Carpentry) but in March of 1952 he was transferred to Department 15 (pipefitting) where he first worked as an apprentice and then as a pipefitter. He voluntarily left the shipyard on March 13, 1953 to serve in the U.S. Army. He was honorably discharged on March 25, 1955 and he returned to work at the shipyard as a pipefitter on March 30, 1955. He was laid-off on November 2, 1956 and he went to work as a rodman

at a company in Topsham, Maine, working there until January of 1957, at which time he was recalled to work at the shipyard. With the exception of a short layoff in 1973 he continued to work at the shipyard until May 1995, at which time he retired at age 62. (CX 15, CX 14)

Decedent, who was not exposed to asbestos while serving in the military or during any of his other employment, was exposed to and inhaled asbestos dust and fibers at the Employer's shipyard "while working in the machinery spaces alongside pipecoverers, cleaners and other trades who handled, cut, removed, applied and cleaned up asbestos insulating materials and debris in the work area. (Decedent) also worked within boiler rooms around pipecoverers who insulated piping, machinery and tanks. Because these compartments (of the vessels) were confined and poorly ventilated, the asbestos dust and fibers released from handling and working with the materials flew about in the air and he "could not help but inhale them as they floated through the work environment." Decedent directly worked with asbestos during "conversion projects" at the shipyard as he "was required to remove asbestos pipe insulation to allow (him) to get to the piping where (he) was to perform (his) duties." The cutting and removal of the asbestos caused asbestos dust and fibers to float around the ambient air of the work environment and he inhaled that dust and fibers while performing his duties. He did not wear any respirator or any other type of protective breathing device, nor was he provided any such device by the Employer. He continued to be exposed to asbestos until the mid-1970s, at which time he was transferred to work in the pipefitting shop where he performed assembly work. (CX 15)

Donald L. Hutchins, a co-worker of the Decedent, worked at the Employer's shipyard from 1964 to 1989 as a pipefitter and he "worked in the machinery spaces mostly" on board the vessels approximately eighty (80%) percent of his work day until he was transferred to office work in 1989. Mr. Hutchins was exposed to and inhaled asbestos dust and fibers as he worked in close proximity to pipe coverers who were cutting and applying asbestos as insulation in the machinery spaces, fire rooms and the engine rooms. The ventilation in the compartments was "(n)ot good." According to Mr. Hutchins, the Employer stopped using asbestos in 1975 "as far as covering pipes," and he also did not use a respirator while performing his duties as a pipefitter. He and Decedent worked together at the shipyard, often "in the same crew," Mr. Hutchins estimating that Decedent also spent about eighty (80%) percent of his work shift on the boats. Mr. Hutchins corroborated Decedent's affidavit that he (Decedent) was exposed to and inhaled asbestos dust and fibers while working at the shipyard and that neither wore respirators or any other breathing device while performing their pipefitting duties. He began working with Decedent sometime in 1964 and he knew him only as "a fellow employee." He and Decedent both worked on conversion projects where an already commissioned vessel returns to the shipyard for

overhaul or refurbishing to meet then current U.S. Navy specifications. Mr. Hutchins had been told that the insulating material being used at the shipyard until 1975 was asbestos. He was transferred to an office environment in July or August of 1989. (CX 17 at 153-166)

The parties deposed William A. Lowell, II, on November 19, 1999 (EX 16) and Mr. Lowell, who worked at the shipyard in various supervisory positions from 1962 to 1995 and who is very familiar with the Employer's use of asbestos at the shipyard, testified that Decedent "was a veteran of Bath Iron Works," "predated him (Mr. Lowell) by a significant amount of time" and "worked in the pipe shop all the while that (he) knew (Decedent) from 1962 to 1995" and both "retired (at) about the same time" in 1995, actually within one month of each other. Mr. Lowell further testified that asbestos was used at the shipyard in new construction from 1962 until the fall of 1973, at which time "Owens Corning came out with an asbestos-free calcium silicone pipe covering," and beginning in 1974 the Employer used "asbestos-free pipe covering" on new ship construction. Mr. Lowell reviewed Decedent's affidavit (CX 15) and he agreed that Decedent was exposed to asbestos during the 1950s, 1960s and until the mid-1970s and that Decedent was not exposed to asbestos in the pipe shop thereafter because "no pipe covering activity . . . takes place in the pipe shop," and "in the mid-70s on, there really wouldn't have been any packing materials in the pipe shop." (EX 16 at 3-9)

According to Mr. Lowell, the Employer's first conversion was in 1968 on the **USS HARRY YARNELL**, (Deposition Exhibit 3 to EX 16), and the last conversion at the shipyard involving the removal of asbestos was in 1972 on the **USS HALSEY**, after which time period the "conversion work was done in Portland" at the Employer's so-called Portland facility, also a maritime facility adjacent to the navigable waters of Casco Bay and the Atlantic Ocean. Mr. Lowell opined that Decedent would have been last exposed to asbestos in 1974. (EX 16 at 9-20)

As noted, Decedent retired on April 30, 1995 (CX 14 at 99) and his medical problems, as reported by Dr. Timothy R. Howe on May 14, 1997, included DJD (degenerative joint disease) of the left hip, hypertension and Crohn's disease. Decreased breath sounds were reported on October 29, 1997 and the doctor's impression was "chronic obstructive pulmonary disease" (COPD). Pulmonary function studies were ordered and these "demonstrated rather severe obstructive lung disease," and, as of November 26, 1997, the doctor's impression included, **inter alia**, COPD with marked restrictive component" and "no significant improvement post bronchodilator." Decedent's breathing problems worsened and additional diagnostic tests led Dr. Howe, as of November 17, 1998 to add asbestosis to Decedent's multiple diagnoses. Dr. Howe recommended annual physical examinations to monitor the asbestosis. "Markedly decreased breath sounds" were reported on January 20,

1999 and “increased SOB” was reported on March 2, 1999. “Congestive failure” and “COPD” were reported also at that time. Dr. Howe prescribed Lasix and Zestril and continued the Azulfidine and Metronidazole and Combivent inhaler. (CX 10)

Dr. Howe referred Decedent to Dr. Paul La Prad for a pulmonary evaluation and Dr. La Prad examined Decedent at the Parkview Hospital on March 24, 1999 and the doctor states as follows in his report (CX 11 at 24):

> **IDENTIFICATION:** Mr. John Burgess is a 66-year-old male, former smoker, Bath Iron Works pipefitter who is admitted one day ago complaining of a three-week history of progressive dyspnea.
>
> Pulmonary/critical care medicine consultation has been requested for evaluation and treatment of respiratory failure.
>
> **IMPRESSION:**
>
> 1) Acute/chronic respiratory failure-arterial blood gas obtained on 50%. FiO2 reveals a pH of 7.34, PCO2 49 torr, PO2 62 torr and estimated bicarbonate of 27.
>
> 2) Chronic obstructive airway disease.
>
> 3) Asbestosis.
>
> 4) Asbestos related pleural disease.
>
> 5) Kyphoscoliosis.
>
> 6) Severe pulmonary hypertension approaching systemic level.
>
> 7) History of Crohn’s disease.
>
> 8) Elevated erythrocyte sedimentation rate.
>
> 9) Macrocytosis, MCV 103.5.
>
> The acute exacerbation may be a consequence of generalized progression of the above mentioned abnormalities, as well as superimposed acute infection.

Dr. La Prad ordered diagnostic tests and, after reviewing these tests and the results of the physical examination, concluded as follows (CX 11 at 19):

> **FINAL DIAGNOSES:**

1) Right lower lobe pneumonia.

2) Chronic obstructive pulmonary disease with asbestosis.

3) Congestive heart failure, right-sided, secondary to severe pulmonary hypertension.

CONSULTATIONS: R. Scott Schafer, M.D., Cardiology. Paul LaPrad, M.D., Pulmonology.

HISTORY: John Burgess is a 66-year-old gentleman, who presented to the hospital with marked shortness of breath, diaphoresis, sweatiness and fever. He was admitted to Intensive Care Unit because of marked hypoxia.

PAST MEDICAL HISTORY:

ILLNESSES: Chronic obstructive pulmonary disease, severe scoliosis, degenerative joint disease. Ulcerative colitis.

SURGERIES: Status post-left hip replacement, carpal tunnel release on the left...

Decedent's condition rapidly deteriorated and he passed away on May 9, 1999 and Dr. Howe has certified as the immediate cause of death "pulmonary hypertension" due to or as a consequence of "pulmonary fibrosis" and "asbestosis." (CX 6 at 10)

An autopsy was performed and Dr. Douglas A. Pohl, MD, Ph.D., concludes as follows in his June 1, 1999 Pathology Report (CX 12 at 53):

Clinical Summary:

The decedent was a 66-year-old man who presented to medical attention with progressive shortness of breath. He was evaluated by Dr. Howe in December, 1998 and felt to have asbestosis. Mr. Burgess had worked for Bath Iron Works for many years with exposure to asbestos. He had also been a smoker, quitting in 1983. He was recently admitted to Parkview Hospital on March 23, 1999 after developing a lower lobe pneumonia. Mr. Burgess was treated with IV antibiotics, oxygen and other supportive measures. He was eventually discharged from the hospital on March 30, 1999. His condition continued to deteriorate and he expired on May 9, 1999. Permission for autopsy was granted by the wife of the decedent, Dorothy Burgess.

Final Autopsy Diagnosis:

Pulmonary asbestosis

Extensive bilateral calcific pleural plaque disease (History of asbestos exposure)

Pulmonary edema, severe

Pleural effusions, (left - 1500 cc., right = 500cc.)

Anasarca

Status post left hip surgery

Obesity

Edentulous

Dr. Pohl sent the following letter to Decedent's attorney on June 7, 1999 (CX 12 at 56):

> I thought I'd write to summarize the results of the autopsy examination that I performed on Mr. John Burgess on May 10, 1999. This examination revealed severe bilateral pleural plaque disease indicative of past asbestos exposure. In addition, examination of the lung parenchyma showed advanced pulmonary asbestosis with associated pulmonary edema and generalized anasarca. Mr. Burgess' pulmonary asbestosis was clearly the cause of his death.
>
> It is my understanding that Mr. Burgess worked at the Bath Iron Works and was regularly exposed to asbestos over a period of years. In light of the autopsy findings, it is my opinion that Mr. Burgess' work at the Bath Iron Works caused his pulmonary asbestosis and therefore was responsible for his recent demise.

Dr. Howe, Board-Certified in Internal Medicine, reiterated his opinions at his November 30, 1999 deposition (RX 2), and his opinions withstood intense cross-examination by Respondents' attorneys.

John C. Burgess, Jr. ("Decedent'), a widower, married Dorothy L. McIrvin ("Claimant") on February 14, 1981 (CX 3-CX 5) and she was living with and was dependent upon Decedent at the time of his death on May 9, 1999. (CX 6 at 10) Claimant testified that Decedent smoked about 1 ½ packs per day, that he began that habit at age 14-15 (EX 10), that they had known each other since high school, that he was still smoking at the time of their 1981 marriage and that he and she stopped smoking in July of 1983, shortly after experiencing an esophageal spasm after drinking a carbonated beverage, Decedent believing the spasm to be a heart

attack. (TR 22-29; CX 16) Funeral expenses exceeded $3,000.00 (CX 7 at 11)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific**

Dry Dock Industries, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**,

29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Respondents dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Respondents to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his asbestosis, resulted from working conditions or resulted from his exposure to and inhalation of asbestos at the Employer's shipyard. The Employer and its Carriers have introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as

naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Decedent’s daily exposure to and inhalation of asbestos dust and fibers as a maritime employee at the Employer’s

shipyard has resulted in the development of asbestosis, that the date of injury is November 19, 1998 on the basis of Decedent's arterial blood gas studies which demonstrated a severe restrictive lung disease (CX 11 at 51), that Claimant gave timely notice of Decedent's injury and death in a timely fashion (CX 1, CX 2), that the Employer and its Carriers have consistently treated Decedent's pulmonary problems as a personal illness and that Claimant timely filed for benefits on behalf of her deceased husband and on her own claim. In fact, the crucial issue is the nature and extent of Decedent's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979). Asbestosis, in my judgment, is such a condition.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under

Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

In the case at bar, I find and conclude that Decedent is a so-called voluntary retiree under the Act because he retired on April 30, 1995 and because his pulmonary asbestosis was not diagnosed

until November 19, 1998. As asbestosis, an irreversible medical condition, is permanent **per se**, Decedent is entitled to an award of benefits for his one hundred (100%) percent permanent partial impairment, beginning on November 19, 1998, based upon the National Average Weekly Wage as of that date, or $435.88. Decedent's asbestosis can reasonably be rated at one hundred (100%) percent permanent partial impairment based on **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989).

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly

wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on May 10, 1999, the date after her husband's death, based upon the National Average Weekly Wage of $435.88 as of that date, pursuant to Section 9, as I find and conclude that Decedent's death resulted from a combination of his work-related pulmonary asbestosis, his pulmonary hypertension and his pulmonary fibrosis, which conditions were first diagnosed and reported by Dr. Howe on November 17, 1998. (CX 10 at 17 and 18) The Death Certificate certifies as the immediate cause of death, pulmonary hypertension (CX 6) and Dr. Howe has opined that Decedent's pulmonary condition was a factor in his eventual demise. (RX 2) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury for which his estate will be receiving permanent total disability benefits from November 17, 1998 until his death on May 9, 1999.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full

amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted the entitlement to benefits by Decedent and the Claimant. (EX 3, EX 7) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine**

Terminals Corp., 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer and its Carriers of her husband’s work-related injury on or about April 8, 1999 (CX 1) and requested appropriate medical care and treatment. However, the Respondents did not accept the claim and did not authorize such

medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer and its Carriers have refused to accept the claim.

Accordingly, the Employer and its Carrier are responsible for the reasonable and necessary medical care and treatment in the diagnosis, evaluation and palliative therapy for his pulmonary asbestosis between November 17, 1998 and May 9, 1999, subject to the provisions of Section 7 of the Act.

Responsible Employer

The Employer and Commercial Union Companies ("Respondents" herein), are responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

This closed record conclusively establishes, and I so find and conclude, that Decedent was last exposed to asbestosis in 1974, that Commercial Union Companies ("Carrier") was the company on the risk under the Act for the Employer at that time and that that

Carrier is responsible for the benefits awarded herein. (EX 16; CX 17)

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (19982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT)

(5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

After the Respondents pay 104 weeks of permanent benefits, the Special Fund is responsible for the remaining benefits awarded herein because the Benefits Review Board has held "that in cases where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. **Davenport v. Apex Decorating Company**, 18 BRBS 194 (1986); **Huneycutt v. Newport News Shipbuilding and Dry Dock Company**, 17 BRBS 142 (1985); **Sawyer v. Newport News Shipbuilding and Dry Dock Company**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (**Decision and Order on Remand**); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1144 (1981).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-

existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

As Decedent was a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for Decedent's asbestosis (CX 12), only Decedent's prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. **See**, **e.g.**, **MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related

disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.)**, **supra**, 21 BRBS at 279."

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom.**, **Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the combination of coalescence of a prior injury with a present one. **Duncanson-Harrelson Company v. Director, OWCP**, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982).

In the case at bar, the Respondents rely upon Decedent's pre-existing hypertension, obesity and cigarette smoking history manifested by COPD problems since at least 1991 in support of its argument that Section 8(f) is applicable herein.

Moreover, as noted above, the Benefits Review Board has held, as a matter of law, that a decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle employer to Section 8(f) relief because they **cannot contribute** to decedent's disability under Section 8(c)(23). **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989). In **Adams**, the Board held that Section 8(c)(23) compensates "only the impairment due to occupational lung disease" and "only decedent's

pre-existing COPD (chronic obstructive pulmonary disease) could have combined with decedent's mesothelioma to cause a materially and substantially greater disease of occupational disease-related disability. Accordingly, decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to a Section 9 Death Benefits claim, only decedent's COPD could, as a matter of law, be a pre-existing disability contributing to decedent's death in this case." **Adams**, **supra**, at 85.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Decedent worked for the Employer as a pipefitter from October 26, 1951 through April 30, 1995, except for the absences noted above (CX 14), (2) that Decedent had a cigarette smoking history of at least 63 pack years (35 x 1 ½ PPD), (3) that he had carried a diagnosis of COPD since at least September 4, 1991 (EX 11), (4) that he had also been obese for many years and was consistently advised by his doctors to lose weight **(Id.)**, (5) that Dr. Howe continued to see Decedent as needed for his multiple medical problems, including "elevated cholesterol" and hypertension on October 4, 1995 **(Id.)**, (6) that Decedent was treated for colon problems in May and June of 1996 (EX 10), (7) that Decedent's breathing problems were reported by Dr. Howe on November 18, 1996 **(Id.)**, (8) that Hypertension was again reported on May 14, 1997 **(Id.)**, (9) that "severe obstructive lung disease" was reported on November 26, 1997 (Id.), (10) that Dr. Howe consistently advised Decedent to lose weight because the added weight was affecting his breathing problems adversely **(Id.)**, (11) that his asbestosis lung disease was diagnosed on November 17, 1998 **(Id.)**, (12) that Decedent was totally disabled by the cumulative effect of his hypertension, obesity and his asbestosis from November 17, 1998 through May 9, 1999, the day of his death, (13) that his death was due to the combination of his pulmonary fibrosis and his asbestosis, as certified by the doctor (CX 6), and (14) that Claimant's one hundred (100%) percent permanent partial impairment is the result of the combination of his pre-existing permanent partial disability (**i.e.**, the above-enumerated pulmonary problems) and his November 17, 1998 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Howe. (RX 2) **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Decedent's condition, prior to his final injury on November 17, 1998, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22

BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

As extensively summarized, I find and conclude that Decedent's one hundred (100%) percent permanent partial impairment is due to the cumulative effects of his multiple medical problems and I further find and conclude that Decedent's death was also due to the combination of these problems, including his sixty-three (63) pack year smoking history, his hypertension, his obesity and pulmonary asbestosis. Accordingly, as Section 8(f) relief is applicable to both of the claims before me, Respondents' obligation is limited to 104 weeks of permanent benefits.

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the AMA Guides. Therefore, where the first medical evidence of record sufficient to establish a permanent impairment of decedent's lungs under the AMA Guides was an April 1985 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March 5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

Accordingly, pursuant to **Ponder**, Decedent's compensation benefits shall begin on November 17, 1998 because his diagnostic tests on that date demonstrated his restrictive permanent impairment. As Section 8(f) applies to both claims before me, the Respondents' obligation herein is limited to 104 weeks of permanent benefits.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and its Carrier (Respondents). Claimant's attorney filed a fee application on January 26, 2000 (CX 18), concerning services rendered and costs incurred in representing Claimant between April 2, 1999 and December 15, 1999. Attorney G. William Higbee seeks a fee of $4,990.90 (including expenses) based on 19.50 hours of attorney time at $175.00 and $195.00 per hour and 2.50 hours of paralegal time at $55.00 per hour.

Counsel for the Respondents has objected to the requested attorney's fee as excessive in view of the benefits obtained and the hourly rates charged. (RX 3)

Attorney Higbee has timely filed the following response in defense of his fee petition (CX 19):

"I am writing in response to Attorney van Antwerp's objection to my new billing rate of $195.00 per hour. I increased my rate from $175.00 to this amount in November of 1999 to bring my hourly charge in line with New England attorneys of equal experience.

"First, I think Mr. van Antwerp will agree that the total amount of my bills has always been reasonable, given the benefits obtained for my clients. In this particular case, Mrs. Burgess was awarded lifetime benefits as well as reimbursement for medical and funeral bills. The total portion of the legal services billed was about $3,700.00 plus disbursements for pathology review, medical reports, etc.

"I am the senior partner in the largest Maine firm which concentrates in State and Federal workers' compensation claims and I have specialized in this type of law for twenty-nine years. I have twenty-two years of experience in handling asbestos claims and have an AV rating from Martindale-Hubbell.

"I am enclosing a copy of a recent fee order signed by Chief Judge Vittone wherein the rates of New England plaintiffs' counsel are stated as between $200.00 to $320.00. Taking that into consideration, I believe that my charge of $195.00 is entirely appropriate given my experience and quality of work."

I agree completely with Attorney Higbee who has always been thoroughly prepared and well-organized when presenting a matter before this Administrative Law Judge.

In accordance with established practice, I will consider only those services rendered and costs incurred after June 16, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

Respondents' counsel objected to the hourly rate and proposed an hourly rate of $170.00 for Attorney Higbee and other members of his firm. The hourly rate suggested by counsel is certainly not realistic at this time, especially in contingent litigation where the attorney's fee is dependent upon successful prosecution. Such a fee if adopted in these claims, would quickly diminish the quality of legal representation. Moreover, Attorney Higbee, an attorney with considerable expertise in Longshore cases and who is a firm partner, has appeared before this Administrative Law Judge since 1981 and has been a member of the bar since 1971.

Attorney Higbee, in my judgment, is certainly entitled to the requested hourly rates and Respondents' counsel's hourly rate is irrelevant herein as counsel is reimbursed in each case irrespective of the result, unlike Claimant's attorney who is awarded a fee only in those cases which are successfully prosecuted.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant and the Respondents' comments on the requested fee, I find a legal fee of $5,170.90 (including expenses of $1,200.90) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. Attorney Higbee is also awarded an additional $200.00 for preparing and filing his defense of his fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer and Commercial Union Companies (Respondents) shall pay to Claimant, as representative of her husband’s estate, compensation for his one hundred (100%) percent permanent partial impairment from November 17, 1998 through May 9, 1999, based upon the National Average Weekly Wage of $435.88, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act.

2. The Respondents shall also pay Decedent's widow, Dorothy Burgess ("Claimant"), Death Benefits from May 10, 1999, based upon the National Average Weekly Wage of $435.88, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

3. The Respondents’ obligation herein is limited to the payment of 104 weeks of permanent benefits and after the cessation of payments by the Respondents, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. The Respondents shall reimburse or pay Claimant reasonable funeral expenses of $3,000.00, pursuant to Section 9(a) of the Act. (CX 7)

5. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Respondents.

6. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Decedent's work-related injury referenced herein may have required between November 17, 1998 and May 9, 1999, subject to the provisions of Section 7 of the Act.

7. The Employer shall pay to Claimant's attorney, G. William Higbee, the sum of $5,170.90 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between April 2, 1999 and February 8, 2000.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:pah:las